

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1130

To be argued by
RONALD L. GARNETT

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1130

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS SORRENTINO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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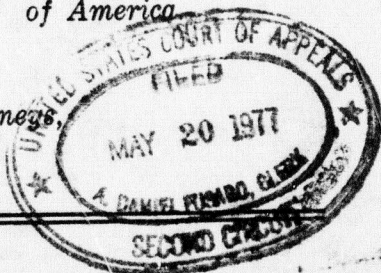


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LOUIS SORRENTINO,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Louis Sorrentino appeals from an order of the Honorable Edward Weinfeld, United States District Judge, entered in the United States District Court for the Southern District of New York on March 2, 1977, denying his motion, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, for a new trial, or in the alternative, for a writ of habeas corpus.

Indictment 76 Cr. 626, filed in two counts on July 6, 1976, charged Sorrentino and two others with having conspired to distribute cocaine in violation of Title 21, United States Code, Section 846, and with having distributed and possessed cocaine with the intent to distribute in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial against Sorrentino began on September 8, 1976. On September 9, 1976, the jury convicted Sorrentino on both counts. On September 30, 1976, Judge Weinfeld sentenced Sorrentino to concurrent terms of three years imprisonment on both counts and a three-year special parole term to commence upon the expiration of his confinement.*

On February 18, 1977, Sorrentino filed a motion for a new trial pursuant to Rule 33, Federal Rules of Criminal Procedure, claiming ineffective assistance of counsel. On March 1, 1977, argument was heard by Judge Weinfeld who denied the motion with an oral opinion, ruling that there was no merit in Sorrentino's claim.

Statement of Facts

1. The Sorrentino Trial

For a full statement of the facts of the trial—which are not at issue on this appeal—the Government respectfully refers the Court to the Government's brief in the appeal of that conviction at pp. 2-6. (Docket No. 76-1452).

In sum, the evidence at that very short trial demonstrated that Sorrentino was the supplier of cocaine to Richard Tate, a co-defendant and co-conspirator, for sale to others. Tate introduced a Government informant to Tate's roommate, Albert Green, who then went to Sorrentino to obtain two ounces of cocaine for sale to the

* This Court affirmed the conviction from the bench by a judgment entered January 24, 1977. *United States v Sorrentino*, Dkt. No. 76-1452.

Subsequently, by an order filed March 31, 1977, Judge Weinfeld reduced Sorrentino's term of imprisonment to two years on each count, pursuant to a motion made pursuant to Rule 35, Federal Rules of Criminal Procedure.

informant and an undercover New York City police officer assigned to the New York Drug Enforcement Task Force. Tate pleaded guilty and testified for the Government against Sorrentino. Testimony showed that Sorrentino and Green arrived in an automobile just prior to Green's delivery of the cocaine to the informant and the undercover officer.

2. The Present Motion

Sorrentino's counsel at all stages of the trial proceedings, from the initial arraignment on the indictment on July 15, 1976, up to and including Sorrentino's sentencing on September 30, 1976, was James E. Siff, Esq. On July 23, 1976, a five count indictment was filed in the United States District Court for the Southern District of New York charging Siff with having conspired to violate the federal narcotics laws and with having aided and abetted the distribution of cocaine on four occasions in February and March of 1974.*

On July 27, 1976, just four days after Siff's indictment, Sorrentino, together with Siff, appeared before Judge Weinfeld with Assistant United States Attorney Federico Virella for a pre-trial conference.

* On October 26, 1976, subsequent to Sorrentino's trial, Siff pleaded guilty to a misdemeanor charge on the condition that he resign from the Bar.

During the period between the indictment and his plea in this district, Siff also represented clients in two other trials. *United States v. Stone*, 76 Cr. 790 (affirmed on appeal, Dkt. No. 76-1550) and *United States v. Alvarez*, 76 Cr. 324 (appeal pending, Dkt. Nos. 77-1085-94). Stone raised substantially similar issues and advanced virtually identical arguments to those now made by Sorrentino; they were rejected by the District Court. *United States v. Stone*, 76 Cr. 790, aff'd without opinion on appeal, Dkt. No. 76-1550.

Judge Weinfeld, obviously solicitous of Sorrentino's rights, engaged Siff, in the presence of Sorrentino, in the following colloquy:

"The Court: Who is the lawyer who called chambers?

Mr. Siff: That was me, your Honor.

The Court: Well, now, is your client here?

Mr. Siff: Yes, your Honor.

The Court: Is your client aware of your difficulty?

Mr. Siff: Completely, your Honor.

The Court: Where is the defendant Sorrentino? Would you come forward, please.

Now, Mr. Siff, have you acquainted your client with the personal problem—

Mr. Siff: Thoroughly, your Honor, and in detail.

The Court: You have. Your own situation?

Mr. Siff: Yes, your Honor.

The Court: And Mr. Sorrentino, are you aware of the fact that your lawyer is in difficulty himself, he is under indictment?

Defendant Sorrentino: Yes, your Honor.

The Court: Would that make any difference as far as your desire to have him represent you? You say no, that would not make any difference, but you are prepared to have him represent you in connection with this charge?

Defendant Sorrentino: Yes.

The Court: You do not desire another lawyer?

Defendant Sorrentino: No." (Tr. 3-4).

On September 8, 1976, more than five weeks after Sorrentino waived any objection to his continued representation by Siff, and without any motion having been

made, the trial of Sorrentino before Judge Weinfeld and a jury commenced. Sorrentino was convicted on September 9, 1976, the following day, and was sentenced on September 30, 1976. Bail was continued pending appeal.*

Siff, as previously noted, pleaded guilty on October 26, 1976.

On February 18, 1977, Sorrentino filed the present motion for a new trial based on his new contention that he had been denied effective assistance of counsel at trial.

* Sorrentino's conviction was affirmed from the bench by a judgment entered January 24, 1977. *United States v. Sorrentino*, Dkt. No. 76-1452. In that appeal, he was represented by retained counsel other than Mr. Siff. While he raised several issues on the appeal, he did not contend that his representation at trial was inadequate, or in any way raise issues later presented in the new trial motion.

A surrender date of February 15, 1977, was set. On February 2, 1977, Sorrentino brought a motion before this court requesting an order granting additional time to file a petition for rehearing with suggestions for consideration en banc, recalling the mandate, and continuing his bail. On February 14, 1976, this Court granted the petition except for the application for continuation of bail, which was denied.

The following day, February 15, 1976, the scheduled day of his surrender, Sorrentino arranged to have himself admitted to Flower Fifth Avenue Hospital for elective surgery. Sorrentino then filed a motion requesting this Court to reconsider its order denying him a continuation of bail and further seeking bail pending determination of his petition for rehearing or, in the alternative, a stay of his surrender until his February 28, 1977, release from the hospital. This Court denied this application on February 15, 1977.

The Government chose not to remove Sorrentino from the hospital at possible risk to his health and accordingly placed him under arrest and twenty-four hour guard until his transfer to the Metropolitan Correctional Center some days later.

On March 25, 1977, no active judge or judge who was a member of the panel having requested that a vote be taken on Sorrentino's suggestion for a rehearing en banc, his petition was denied by this Court.

On March 1, 1977 Judge Weinfeld heard argument on Sorrentino's motion and denied it. At the conclusion of the argument, Judge Weinfeld orally made the following findings of fact:

The Court: The Court is prepared to dispose of the matter.

Although the pertinent facts upon which this application for relief is based were known to the defendant before, during and upon his conviction, this motion was not made until after the affirmance of conviction by the Court of Appeals.

Entirely apart from that, the defendant was specifically questioned by the Court as to whether he desired to have his counsel continue to represent him, and with full awareness of his attorney's problems defendant responded affirmatively.

Moreover, as this Court noted in setting a trial date, "this is a perfectly simple case. There isn't anything complicated about it." (Minutes, July 27, 1976.)

Based upon the Court's own observation, the defendant was ably and competently represented. In fact, a word by word reading of the trial transcript indicates there is no basis for the contention that defendant was denied the effective representation of counsel.

In sum, the defendant knowingly waived his right to engage new counsel and clearly was not prejudiced by the continued representation by his trial counsel.

The motion is denied.*

It is from this ruling that Sorrentino now appeals.

* These findings of fact, not reproduced for the Court by the appellant Sorrentino, see Rule 30(a)(2), F. R. App. P., appear at pp. 22-23 of the transcript of the hearing on March 1, 1977.

A R G U M E N T

Sorrentino Was Not Denied Effective Assistance of Counsel.

Sorrentino contends that he was denied effective assistance of counsel in derogation of his Sixth Amendment rights, solely because his trial counsel, one James E. Siff, was under indictment in the Southern District of New York for narcotics violations during the pendency of Sorrentino's trial. This contention is utterly devoid of merit, for either of two reasons.

First, Sorrentino's failure to raise the claim on his direct appeal of his conviction precludes collateral attack on it. In particular, Sorrentino was represented on appeal by counsel other than (and wholly independent of) Mr. Siff. While he had at that time precisely the same record upon which Sorrentino now makes his collateral claim, and had the services of independent counsel to advise him of that claim, he chose not to raise it on direct appeal. This choice itself bars subsequent review. *Seiller v. United States*, 544 F.2d 554, 561 n.9 (2d Cir. 1975); *United States v. Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975); *United States v. West*, 494 F.2d 1314, 1315 (2d Cir.), cert. denied, 419 U.S. 899 (1974); see generally, *Sunal v. Large*, 332 U.S. 174, 178 (1947).*

Second, and more fundamentally, Judge Weinfeld's disposition of the case was clearly correct. He made an express finding that "the defendant knowingly waived his right to engage new counsel and clearly was not

* In *Kaufman v. United States*, 394 U.S. 217, 227 n.8 (1969), the Supreme Court noted that review is barred to those who "deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal"

prejudiced by the continued representation by his trial counsel." (Tr. March 1, 1977 at 22-23). This waiver alone, during which the facts underlying the claimed conflict were brought out, and in which Sorrentino was given an opportunity to express his views, should preclude further review of his claim. *Abraham v. United States*, 549 F.2d 236 (2d Cir. 1977); *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976); *United States v. Mari*, 526 F.2d 117, 119 (2d Cir. 1975); *United States v. DeBerry*, 487 F.2d 448, 453 (2d Cir. 1973); *United States v. Alberti*, 470 F.2d 878, 881 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973). Furthermore, the factual conclusion was not "clearly erroneous," *United States v. Cirillo*, Dkt. No. 77-1045, slip op. 3247, 3249 (2d Cir., April 28, 1977); *United States v. Eucker*, 537 F.2d 718, 719 (2d Cir. 1976); *Zovluck v. United States*, 448 F.2d 339, 341 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972). As noted, on July 27, 1976, only four days after the return of the Indictment against Siff, the issue was brought to Judge Weinfeld's attention in Sorrentino's presence. A colloquy ensued during which Sorrentino advised the Court that he was aware that his attorney was under indictment. Siff told the Court, in Sorrentino's presence, that he had advised the defendant of Siff's problem, "thoroughly . . . and in detail." In response to the Court's questioning, Sorrentino stated that he wished Siff to continue to represent him, and did not desire the assistance of another attorney (Tr. July 27, 1976 at 3-4).

Even at this late date, Sorrentino is unable to present even an affidavit suggesting that there existed "some specific instance of prejudice, some real conflict of interest," resulting from the conflict allegedly engendered by Siff's indictment. *C.f.*, *United States v. Carrigan*, *supra*, 543 F.2d at 1055; *United States v. Mari*, *supra*, 526 F.2d at 119; *United States v. Vowteras*, 500 F.2d 1210, 1211 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974);

United States v. Wisniewski, 478 F.2d 274, 281 (2d Cir. 1973); *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970). Even now, Sorrentino makes not the slightest suggestion that his waiver was deficient because of the lack of knowledge on his part as to the time, nature and full circumstances of Siff's situation; moreover, he said nothing in court on July 27, 1976, to indicate his lack of knowledge. Indeed, in an affidavit prepared specially for this motion, Siff specifically conceded that "Mr. Sorrentino was apprised of all of the surrounding circumstances concerning my indictment." (App., Siff Affidavit p. 4).

Nor is his claim more persuasive when measured in the posture of a claim of denial of effective assistance of counsel. The only basis of this claim is suggested in Sorrentino's Brief at 11 where reference is made to the Siff affidavit relating to possible speculative effects of Siff's indictment on his ability to adequately represent Sorrentino during trial.*

* In particular, Siff noted:

"Accordingly, it is for this Court to determine whether these factors resulted in rendering me incompetent as matters of fact and law to represent Mr. Sorrentino in his trial. Specifically, whether or not there was a sub-conscious desire not to antagonize the prosecutors and drug agents, which may have entered my decision making process in two crucial determinations, to wit, my decision not to cross-examine the Government witnesses with regard to the occurrences at the scene of the crime and specifically with regard to the only witness who could actually place Mr. Sorrentino at the scene of the crime, and further, my decision not to put the defendant on the stand despite his vehement desire to testify in his own behalf." (App., Siff Affidavit p. 7).

This portion of the affidavit—and indeed Siff's affidavit in its entirety—is eloquent in its conscious determination not to even claim that, in fact, his determination or abilities were in any way hampered by his situation.

In this Circuit the standard applied to claims of ineffective assistance of counsel was stated in *United States v. Wight*, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). There, this Court said: "[U]nless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." 176 F.2d at 379. This standard has repeatedly been applied and reaffirmed by this Court. *United States v. Taylor*, Dkt. No. 76-1210, slip op. 2805, 2829 (2d Cir. April 13, 1977); *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976); *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976); *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Walker v. Henderson*, 492 F.2d 1311, 1312 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974). Even under the more lenient standards adopted by some other circuits, Sorrentino has failed to sustain his heavy burden of establishing that the assistance of his counsel was ineffective. See, e.g., *United States v. Fessel*, 531 F.2d 1275, 1278 (5th Cir. 1976); *United States v. Toney*, 527 F.2d 716, 720 (6th Cir. 1975); *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied, sub nom. Sielaff, Corrections Director v. Williams*, 423 U.S. 876 (1975); *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973); *Moore v. United States*, 432 F.2d 730, 736 (3d Cir. 1970) (*en banc*). Sorrentino offers this Court mere conclusory and speculative allegations as to Siff's subconscious state of mind that are

plainly insufficient to state a valid claim under the very authorities upon which he relies.*

As against Sorrentino's rather far fetched surmises of prejudice or incompetence, Judge Weinfeld, who presided at Sorrentino's trial, enjoyed the best possible position to evaluate Siff's performance. After argument on the motion for a new trial by Sorrentino, he concluded:

Moreover, as this Court noted in setting a trial date, "this is a perfectly simple case. There isn't

*In his affidavit Siff focuses on two decisions he made during trial as possible areas where his judgment was affected: his decision not to cross-examine Government witnesses as to Sorrentino's presence at the scene of the crime and the decision not to put Sorrentino on the stand. An examination of the entire record reveals that Sorrentino's defense was well-conceived and well-executed. Siff conceded in his opening "... that the only evidence you will hear of any actual nature about Mr. Sorrentino's presence in any of the events concerned in this case will leave you with the only conclusion that I think is fair in this case, that Mr. Sorrentino's only mistake was being in the wrong place at the wrong time." (Tr. 11). Siff then concluded "... you will come to the same conclusion that I have come to, which is that he was in a location where a crime was committed but that he had no participation in that crime" (Tr. 12). The strategy employed was to agree that Sorrentino was present at the scene of the crime, but to deny his participation in it, and to argue in summation that the co-defendant, who testified for the Government, had lied. That Sorrentino was ultimately convicted no doubt makes him an unhappy client; however, the defense tactic utilized did not demonstrate Siff to be incompetent.

The inference that Siff advised Sorrentino not to take the stand possibly because of some subconscious motive not to antagonize the prosecutors in his case is equally unappealing. It is far more likely that Siff felt that Sorrentino testifying to an exculpatory version of the events would have done more harm than good since the Government had previously been granted leave to cross-examine Sorrentino as to his prior conviction for bribery of a police officer. (Tr. March 1, 1977, p. 17).

anything complicated about it." (Minutes, July 27, 1976).

Based upon the Court's own observation, the defendant was ably and competently represented. In fact, a word by word reading of the trial transcript indicates there is no basis for the contention that defendant was denied the effective representation of counsel.

To this day Sorrentino has been unable to make a demonstrable showing of prejudice by the continued representation by Siff as his trial counsel. In view of this, Judge Weinfeld's denial of the motion for a new trial was clearly not an abuse of his discretion. *United States v. Franzese*, 525 F.2d 27, 32 (2d Cir. 1975); *Machibroda v. United States*, 368 U.S. 487, 495 (1962).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
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AFFIDAVIT OF MAILING

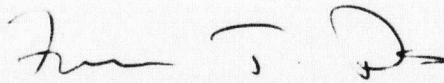
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

FREDERICK T. DAVIS being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the **20th** day of **May, 1977**
he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

BERNARD KENNY, ESQ.
22 East 40th Street
Suite 1718
New York, N. Y. 10016

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.



Sworn to before me this

20th day of **May, 1977**



GLORIA MEYER
Notary Public, State of New York
No. 31-0535340
Qualified in New York County
Commission Expires March 30, 1978

